United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7443

In The

United States Court of Appeals

For The Second Circuit

B

B/S

BARBARA GIRARD,

Plaintiff-Appellant,

vs.

94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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-against-	:	Docket No. 75-7443
94TH STREET AND FIFTH AVENUE CORPORATION, LAWRENCE WILKINSON, JOHN H. STOOKEY and THOMAS E. MURRAY,	:	
Defendants-Appellees.	:	

BRIEF FOR DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

Plaintiff Barbara Girard appeals from an order made by Judge Robert J. Ward (2A, 105A)* granting summary judgment to defendants dismissing the claims alleged herein under §§ 1 and 2 of the Civil Rights Act of 1871, 42

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*References are to pages of the Appendix

U.S.C. §§ 1983 and 1985(3), on the grounds that ~~plaintiff~~ defendants' neither did nor could have entered into a conspiracy and that there was not sufficient "state action" to support plaintiff's claim that defendants acted "under color of" law, when, pursuant to an agreement in writing, the corporate defendant 94th Street and Fifth Avenue Corporation refused to consent to the transfer of 497 shares of its stock to plaintiff. Judgment was also granted to defendants dismissing plaintiff's pendent state claim. Judge Ward's opinion (89A-102A) has not yet been reported, but it has been excerpted. 44 U.S.L.W. 2025 (S.D.N.Y. June 30, 1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Fourteenth Amendment, Sections 1 and 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Civil Rights Act of 1871, §1, 42 U.S.C. §1983 (1970)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Civil Rights Act of 1871, §2, 42 U.S.C. §1985(3) (1970)

If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

QUESTIONS PRESENTED FOR REVIEW

1. Did the actions of defendant 94th Street and Fifth Avenue Corporation (the "Corporation"), a corporation owning a cooperative apartment house in New York City, violate sections 1 and 2 of the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1985(3) (1970), when, pursuant to and consistent with the terms of a typical provision in lease agreements relating to cooperative apartments, the Corporation, through its board of directors (the individual defendants herein), refused to consent to the transfer of 497 shares of its stock to plaintiff Barbara Girard.

2. Are the claims plaintiff asserts barred by reason of the doctrine of res judicata.

STATEMENT OF THE CASE

Plaintiff Barbara Girard commenced this action on February 10, 1975, when the summons was filed (1A). The complaint alleges that the plaintiff resides at, and that the Corporation owns and manages, the cooperative apartment building at 1125 Fifth Avenue in the City of New York (3A-4A). The individual defendants are alleged to constitute the Corporation's officers and Board of Directors (4A).

According to the complaint, in January of 1968, Stephen Girard, who was then plaintiff's husband, (i) pur-

chased 497 shares of the Corporation's stock (the "stock"), (ii) became the owner of a proprietary lease (the "lease") with respect to the fourth floor apartment in the Corporation's building, and (iii) with plaintiff, occupied said apartment (4A-5A). Thereafter, plaintiff and Stephen Girard allegedly entered into a separation agreement which, inter alia, assigned the stock and the lease to plaintiff (5A).

Plaintiff is then alleged to have demanded that the Corporation consent to the transfer of the stock from Stephen Girard to plaintiff, but the Corporation allegedly refused without permitting plaintiff to appear at Board of Directors' meetings and without providing to plaintiff minutes of said meetings (5A, 6A-7A).

By reason of these acts, plaintiff asserts that she was deprived of her constitutional rights under the Fourteenth Amendment to the United States Constitution (9A-10A). Plaintiff further alleges that she was deprived of said rights as a result of a conspiracy on the part of defendants, and, in furtherance of said conspiracy, it is alleged that defendants denied plaintiff permission to continue to occupy the apartment, refused payments from plaintiff and guarantees for plaintiff's future payments from third parties, and harassed plaintiff (7A-8A).

Nowhere does the record indicate that the individual defendants acted outside their capacities as directors (100A). Nowhere does the record indicate that the refusal by the Corporation to consent to the transfer of the stock from Stephen Girard to plaintiff was imbued with any "state action." Nowhere does the record indicate that the apartment in issue was plaintiff's marital residence. The separation agreement shows instead that plaintiff was resident in England when Stephen Girard assigned the stock to her (38A). And nowhere (contrary to plaintiff's brief at page 3) does the record indicate that the stock was bought by Stephen Girard and plaintiff together. The lease shows that the stock was purchased by Stephen Girard only (13A-33A, 67A).

Plaintiff seeks injunctive relief directing that the Corporation recognize plaintiff as the lawful owner of the stock and the lease and enjoining defendants from interfering with plaintiff's peaceful enjoyment and possession of the apartment. Plaintiff predicates her claims on 42 U.S.C. §§ 1983 and 1985(3), and New York Executive Law, § 296(5)(a)(1), (9A-11A).

The Lease

The refusal to consent to the assignment from Stephen Girard to plaintiff could not have come as a surprise to plaintiff. The lease agreement entered into between Stephen Girard and the Corporation expressly provided that

the Board of Directors of the Corporation, on the Corporation's behalf, had to consent to any such assignment. The lease in relevant part provides:

> "Except as provided in Article IV of this lease [relating to cancellation of the lease], the Lessee shall not assign this lease, or any interest therein, and no such assignment shall take effect as against the Lessor for any purpose, unless and until all of the following requirements have been complied with and satisfied:
>
> * * *
>
> "4. A written consent to such assignment, authorized by a resolution of the Board of Directors, or signed by a majority of the directors ... must be delivered to the Lessor." (21A)

Such a provision is typical with respect to cooperative apartment leases in New York City and is enforceable under New York law (80A).

The Decision of Judge Ward

After service of the summons and complaint, defendants, by notice of motion, moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted or, in the alternative, for summary judgment (56A). Affidavits and exhibits were submitted to Judge Ward by both sides and he treated the motion as one for summary judgment (90A).

Judge Ward granted summary judgment to defendants

(1) dismissing plaintiff's § 1983 claim

for failure to allege facts sufficient to support a finding of "state action" (94A),

(2) dismissing plaintiff's claim for relief under § 1985(3) because on the facts shown plaintiff could not have established a conspiracy (99A-100A), and

(3) dismissing plaintiff's pendent state claim (101A).

Judge Ward did not consider the additional argument raised by defendants below that the action was barred under well-established principles of res judicata (101-102A).

After Judge Ward had rendered his decision, an appropriate order was entered in favor of defendants (105A). Thereafter, plaintiff noticed the instant appeal (2A).

The Prior State Court Actions

Prior to the institution of this case, and on August 14, 1973, an action ("Action No. 1") entitled "Barbara Girard, plaintiff, against 94th Street and Fifth Avenue Corporation, defendant," Index No. 15173/73, was

brought by plaintiff in the Supreme Court of the State of New York, New York County, on the same cause of action and relating to the same apartment as the instant action (61A-66-A). Plaintiff there, as here, recited the transfer of the stock and lease from Stephen Girard to plaintiff, her request to the Corporation that it consent to said transfer and the Corporation's refusal to do so (63A). Plaintiff there, as here, sought relief directing the Corporation to consent to the transfer of the stock and lease (65A). Plaintiff also, in the Supreme Court action, sought a declaration that the Corporation's refusal to consent was "arbitrary, capricious and unreasonable (65A-66A).

Also prior to the institution of this case, but after the Corporation had terminated the lease by notice as provided for in the lease (25A-26A) on account of the improper assignment of the stock, an action ("Action No. 2") was commenced by the Corporation against Stephen Girard and against plaintiff herein in Civil Court, County of New York (109A). Action No. 2 was a holdover proceeding for possession of the apartment (68A-80A).

Plaintiff, in Action No. 1, moved for removal of Action No. 2 from the Civil Court to the Supreme Court, New York County, for purposes of joint trial. The motion was denied (75A, 78A-80A). The Corporation moved for summary judgment in

Action No. 1. The motion was granted by Justice Spiegel (75A, 78A-80A). The Court held that defendant had the right and power to reject plaintiff's demand to transfer the stock and to refuse to consent to the assignment of the lease, and that such refusal was authorized by and consistent with the terms of the lease (78A-80A). An appropriate order and judgment based on Justice Spiegel's decision were entered on July 30, 1974 (73A-77A). The third and fourth decretal paragraphs thereof recite:

> "ORDERED, ADJUDGED AND DECREED, that the defendant have judgment against the plaintiff dismissing the complaint herein and that the rights of the parties are declared to be as follows:
>
> * * *
>
> "3. That defendant corporation has the right or power to refuse to consent to the assignment of the proprietary lease from Stephen S. Girard to Barbara Girard of the fourth floor Apartment at 1125 Fifth Avenue, New York, New York 10028; and
>
> "4. That the defendant corporation's refusal to transfer the stock of defendant corporation from Stephen S. Girard to Barbara Girard and to consent to the assignment of the proprietary lease to the apartment located on the fourth floor of 1125 Fifth Avenue, New York, New York, was authorized by and consistent with the terms of said proprietary lease; . . . " (76A)

The Appellate Division, First Department, affirmed the order and judgment made by Justice Spiegel (60A).

Plaintiff's motion for leave to appeal to the Court of Appeals was denied on January 9, 1975 (60A).

One month later, plaintiff commenced this action (1A).*

---

* It appears that the sole impetus to this action was Justice Spiegel's reference to the "Civil Rights Laws" (80A) in his opinion holding that the corporation had the right and power to refuse to consent to the transfer of the stock and lease to plaintiff.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM UNDER § 2 OF THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1985(3)

For relief to be granted under § 1985(3), plaintiff must plead and prove that defendants

(1) conspired or went in disguise on the highway or on the premises of another;

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.

The complaint must then assert that one or more of the conspirators

(3) did, or caused to be done, any act in furtherance of the object of the conspiracy, whereby another was

(a) injured in his person or property, or

(b) deprived of having and exercising any right or privilege of a citizen of the United States.

Griffin v. Breckinridge, 403 U.S. 88, 102-103 (1971).

It is defendants' position that plaintiff cannot establish a violation of § 1983(5) by defendants. She has failed to allege, and is unable on the facts pleaded to show, the existence of the requisite conspiracy (Point I-A, infra), or that defendants' purpose was to deprive plaintiff of equal protection of, or equal privileges and immunities under, the laws (Point I-B, infra). Since no conspiracy existed or could have existed, no act was done by defendants in furtherance thereof.

A. There Can Be No Conspiracy By A Single Entity

When the Corporation refused to consent to the transfer of stock from Stephen Girard to plaintiff, it was acting pursuant to the provisions of the lease. The lease stipulates that consent is required before an assignment can take effect. Understandably, the Corporation's decision on plaintiff's request was formulated and carried out by the members of its Board of Directors, the individual defendants herein. No allegation is made that these directors were acting outside of their official capacities in refusing the requested transfer.

Accordingly, none of the defendants were, or could

have been, part of a conspiracy.

> "The acts of the agent are the acts of the corporation . . . . A corporation cannot conspire with itself any more than a private individual can." Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

These precepts have been applied in factual circumstances very close to those involved here. In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), the plaintiff, an attorney, alleged that the corporate manager of a building and two of the manager's employees, in violation of § 1985(3), conspired to and did refuse to rent plaintiff space because a substantial number of his clients were black. The Court, in holding that judgment for the plaintiff could not be grounded on § 1985(3), stated:

> "[T]he statutory requirement that 'two or more persons . . . conspire or go in disguise on the highway,' is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm."

Dombrowski has been accorded substantial, if not decisive, weight on similar conspiracy issues by many courts, including the district court below (99A). See, e.g., Baker v. Stuart Broadcasting Company, 505 F.2d 181, 183 (8th Cir. 1974); Cole v. University of Hartford, 391 F. Supp. 888 (D. Conn. 1975); and Fallis v. Dunbar, 386 F. Supp. 1117

(N.D. Ohio 1974).

In the Fallis case, the plaintiffs, former tenants of the corporate defendants, alleged that the renewal of their lease was denied by the corporate defendants and their employees (who were also named as defendants), and that said defendants sought to evict them, all for organizing and being active in a tenants' association.

Although there was some question about whether plaintiffs had abandoned their 1985(3) claim, the Court ruled as follows in granting defendants' motion to dismiss:

> "Given the fact that only Dunbar Real Estate Co. and its officers, employees and agents were involved in the actions complained of, the Court finds that there were not 'two or more persons' who conspired to deprive plaintiffs of any civil rights. A corporation exists as a person only in a legal sense; it can act and speak only through its officers, employees, and agents. The action of Roger Dunbar in deciding to evict plaintiffs and the actions of other employees and agents in carrying out that decision were within the scope of their employment by Dunbar Real Estate Co. As such, the conspiracy requirement of § 1985(3) has not been met." 386 F. Supp. at 1121.

Although plaintiff cites no less than 50 cases in support of her 1985(3) claim, it appears that she relies principally on Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975), Stern v. Massachusetts Life Insurance Co., 365 F. Supp. 433 (E.D. Pa. 1973), and Rackin v. University

of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974). Westberry and Stern involved corporate defendants charged with § 1985(3) violations, and plaintiff asserts that Rackin effectively distinguishes Dombrowski. Only summary treatment is required to show the inapplicability of these authorities.

First of all, the Court's opinion in Westberry was withdrawn, the judgment of the Court was vacated and the cause was "remanded to the district court with directions to dismiss as moot, so that it will spawn no legal precedents." 507 F.2d at 216 (Emphasis added.)

Second, Stern makes no reference at all to the conspiracy requirements of § 1985(3). Apparently, that point was not in issue in the opinion cited.

Third, Rackin v. University of Pennsylvania involved a professor who alleged sex discrimination on the part of her University, certain of its officers, and certain of its tenured faculty members because she was denied tenure in the English Department and was relegated to teaching freshman courses and courses not in her area of specialization. The Court noted that these acts were undertaken by the defendants "under circumstances which deviated from normal procedure" and "contrary to the University's policy." 386 F. Supp. at 994. Accordingly, the Court distinguished Dombrowski.

Clearly, the instant case is closer to Dombrowski and Fallis than to Rackin. Both Fallis and Dombrowski, like the instant case, but unlike Rackin, involved the rejection of a tenant's, or prospective tenant's, claim that his landlord's refusal to permit him to remain, or to become, a tenant violated his constitutional rights.

Nor can the allegation of harassment adverted to in plaintiff's brief change the proposition that no conspiracy can exist between a corporation and its agents acting in their capacities as directors.* Plaintiff makes no allegation that the individual defendants acted otherwise. As in Cole v. University of Hartford, supra, 391 F. Supp. at 892-893:

> "In this case the officers have been joined as defendants in their individual capacities . . . . Thus there are really three defendants in this

---

* Inasmuch as reference to the allegation of harassment does not appear in plaintiff's motion papers submitted below (82A-88A), we find it remarkable that plaintiff should charge that Judge Ward "overlooked" it.

case: the University plus its officers acting in their official capacities, Woodruff acting in his individual capacity, and McKinley acting in his individual capacity. The plaintiff argues that he has alleged a conspiracy among these three defendants. However, in order to find, as Cole wishes, that the University can be a party to any conspiracy among these defendants, a very narrow set of circumstances must be found. Obviously the University, acting through Woodruff (or McKinley), cannot conspire with Woodruff (or McKinley) acting in his individual capacity. In order to do so Woodruff (or McKinley) would have to conspire with his individual hat. But no matter how many hats he wears, an individual cannot conspire with himself.

* * *

"Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties. In this case no such allegation has been made . . . ." [Citations omitted]

B. Plaintiff Is Not A Member Of A Class Covered By § 1985(3). She Has Not Been Deprived Of Any Constitutional Right

Although we have shown, and Judge Ward has concluded below, that plaintiff's conspiracy allegations cannot stand, we are constrained to set forth yet another reason why plaintiff's 1985(3) claim is fatally defective. That reason is that plaintiff is not a member of a class covered by 1985(3). We deal here with the second requisite of 1985(3)--that defendants' purpose must have been to deprive plaintiff

of equal protection of, or of equal privileges and immunities under, the laws (see page 13, infra).

Simply stated, our position here is that because plaintiff cannot show "state action" with respect to the alleged discrimination (see Point II, infra), she cannot show that the alleged conspiracy was directed to deprive her of equal protection of, or of equal privileges and immunities under, the laws.

Comparison of the provisions of §§ 1983 and 1985(3) will illuminate what we submit is the showing of state action required of plaintiff here. Both sections were enacted together as §§ 1 and 2 of the Civil Rights Act of 1871.

Section 1983 contains two distinct requirements. First, the statute by its terms proscribes only those acts "under color of" law. Second, the statute protects plaintiff from the deprivation "of any rights, privileges or immunities secured by the Constitution and laws." Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

Section 1985(3) omits the "under color of" law language; and Griffin v. Breckinridge, supra, held that by reason of that omission, § 1985(3) could reach purely private conspiracies. The omitted language, however, relates

only to the ~~plaintiff's~~ defendants conduct. Griffin did not delineate the scope of the rights or interests protected by § 1985(3).

With respect to those rights or interests, the language of §§ 1983 and 1985(3) differs. Section 1983 speaks of the deprivation "of any rights, privileges, or immunities secured by Constitution and laws," while § 1985(3) requires that a conspiracy be directed to the deprivation "of equal protection of the laws, or of equal privileges and immunities under the laws." Nevertheless, the coverage of the two phrases is probably the same. Dombrowski v. Dowling, supra, 459 F. 2d at 194-195. The analogous criminal provisions, 18 U.S.C. § 241 (relating to conspiracies) and § 242 (relating to acts "under color of law"), have been said to be "identical in the scope of the rights they secure." Screws v. United States, 325 U.S. 91, 120 (1945) (opinion of Rutledge, J.). Thus, before recovery under either § 1983 or § 1985(3) can be had, the deprivation of a constitutionally secured right must be shown.

Here, plaintiff alleges she suffered discrimination because of her sex, but such discrimination does not become constitutionally impermissible unless practiced by the State. Breckinridge grounded its holding on the deprivation of the plaintiffs' Thirteenth Amendment rights against racial bias--

a right secured to them by the Constitution whether or not "state action" was involved. The Court expressly stated it was not deciding whether a conspiracy motivated by invidiously discriminating intent other than racial bias would be actionable [under § 1985(3)]". 403 U.S. at 102, fn. 9.

Plaintiff's claim that the discrimination she alleges violated the due process or equal protection clauses of Section One of the Fourteenth Amendment is ill-conceived. That section specifies that it proscribes only the actions of the State. And this Court has so held:

> "It is not and cannot be disputed that the Fourteenth Amendment applies only action by the State and not to action which is private." Bond v. Dentzer, 494 F.2d 302, 305 (2d Cir. 1974).

Similarly, the acts alleged do not violate the Fifth Amendment. That amendment proscribes only the acts of the federal government. Palko v. Connecticut, 302 U.S. 319, 322 (1937).

Indeed, plaintiff, at page 28 of her brief, acknowledges these facts:

> "The Fifth Amendment is primarily for federal action and the Fourteenth Amendment primarily for state action."

The principal cases cited by plaintiff in support of her claim that she was deprived of a constitutionally

secured right are not in point. They either hold that "state action" was involved and thus the discrimination alleged did, in fact, violate the due process or equal protection provisions of the Fourteenth Amendment, Rackin v. University of Pennsylvania, supra, 386 F.2d at 995-1005; Stern v. Massachusetts Indemnity & Life Insurance Co., supra, 365 F. Supp. at 436-442; Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973,; or involved racial discrimination, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Richardson v. Miller, 446 F.2d (3rd Cir. 1971).

The sole exception appears to be Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974) There, in a sex discrimination case, the Court found no "state action" and, accordingly, dismissed the § 1983 claim, but held that plaintiff had stated a cause of action under 1985(3).

It is submitted that Pendrell is wrong. The Court did not give an adequate explanation of how, assuming no "state action," the defendants' conspiracy, if carried out, would have constituted a violation of plaintiff's constitutional rights.

We think the better reasoning is expressed in Dombrowski, at page 196, in factual circumstances analogous to those here.

> "Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights. We therefore conclude that an arbitrary business discrimination . . . does not deprive plaintiff of 'equal protection of the laws' within the meaning of § 1985(3) if there is no state involvement whatsoever in the discrimination."

Dombrowski has been cited with approval for the above proposition that state involvement is necessary to a § 1985(3) action for Fourteenth Amendment rights in Flores v. Yeska, 372 F. Supp. 35, 39 (E.D. Wisc. 1974); and Cohen v. Illinois Institute of Technology, 384 F. Supp. 202, 205 (N.D. Ill. 1974).

Accordingly, the district court properly dismissed plaintiff's claim under § 1985(3).

POINT II

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM UNDER § 1 OF THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983

For plaintiff to establish her entitlement to relief under § 1983, she must show the existence of two elements:

(1) that defendants deprived her of a right secured by the "Constitution and laws," and

(2) that defendants deprived her of such a right "under color of" law.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

It is defendants' position, which Judge Ward accepted below, that plaintiff cannot meet these requirements.

A. Defendants Committed No Acts "Under Color of" Law

What plaintiff is complaining about in this action is that the Corporation refused to consent to the transfer of the stock to plaintiff. Nowhere does the record indicate that said refusal was action"under color of" law. The "under color of" law language of the statute has been consistently construed to require that "state action" exist. Id at p. 163, and Note, 74 Col. L. Rev. 656, fn. 4 (1974). The Corporation in refusing to consent to said transfer was merely exercising its rights under a clause in

the lease, which clause the New York Supreme Court found to be enforceable (80A). In these circumstances, plaintiff's claim that defendants violated § 1983 is without substance. There was no "state action". As was said in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972):

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Case, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

It is evident in the instant case that not only has there been no "significant involvement" by the state in the activities of defendants, but there has been no state involvement at all.

Plaintiff's position on her § 1983 claim appears to be that because the Corporation, by summary proceeding in the state courts, sought to evict plaintiff and to terminate the lease, the Corporation's acts in denying the transfer of the

stock was somehow infused with "state action." The long and short of plaintiff's position is that any time reference is made to a state-provided forum for resolution of a dispute, however private, sufficient "state action" is present to support a § 1983 claim. Plaintiff cites only one case in support of this position--Shelley v. Kraemer, 334 U.S. 1 (1948).

This Court has soundly refuted plaintiff's argument before.

> "Citing Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), [plaintiff] argues that the requisite state action is present because Pennsylvania has provided a forum for the . . . lawsuit, ... While Shelley v. Kraemer does establish that the action of state courts may constitute state action for purposes of the Fourteenth Amendment and thus may give rise to a claim under the Civil Rights Act of 1871, the state judicial action involved in Shelley is readily distinguishable from that presented here. In Shelley the state courts, following a settled line of state decisions, had enforced racially restrictive covenants in deeds. The state had thus provided 'the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners [were] willing and financially able to acquire and which the grantors [were] willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants [was] the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.' 334 U.S. at 19, 68 S.Ct. at 845.
>
> ". . . Thus far Pennsylvania has merely provided a forum to determine the rights of the parties. Both

> logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state in the sense that [plaintiff] suggest."

Stevens v. Frick, 372 F.2d 378, 381 (2d Cir. 1967), cert. denied, 387 U.S. 920 (1967.

Judge Ward found the reasoning in Stevens persuasive (97A).

Accordingly, as a general principle, the filing of a suit by a private party is not "state action." More specifically, this Court and others have held that the institution of an eviction suit by a landlord is not action "under color of" state law. McGuane v. Chenango Court, Inc., 431 F.2d 1189, 1190 (2d Cir. 1970), cert. denied, 401 U.S. 994 (1971); Weigand v. Afton View Apartments, 473 F.2d 545, 548 (8th Cir. 1973); Mullarkey v. Borglum, 323 F. Supp. 1218, 1125-1227 (S.D.N.Y. 1970); Fallis V. Dunbar, supra,386 F. Supp. at 1120-1121.

In McGuane the plaintiff, complaining that her landlord refused to renew her lease, brought an action under § 1983 alleging violation of her civil rights. The Court dismissed the plaintiff's § 1983 claim, saying at page 1190:

> "Neither, despite some language in Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92

L.Ed. 1161 (1948), can state action be found in New York providing defendant with the same right to secure the eviction or a tenant by a proceeding in its courts that it gives to all landlords; the one thing now almost universally agreed is that such a rationale for that landmark decision would be altogether too far-reaching."

Accordingly, plaintiff's claim under § 1983 fails because of the absence of the requisite "state action."

B. Plaintiff Is Not A Member Of A Class Covered By § 1983. She Has Not Been Deprived Of Any Constitutional Right

For reasons set forth in Point I-B, supra, plaintiff is not a member of a class covered by § 1983 because she has not been deprived of any constitutional right.

POINT III

WELL-ESTABLISHED PRINCIPLES OF RES JUDICATA REQUIRE THE DISMISSAL OF PLAINTIFF'S CLAIMS

Plaintiff could have come directly to the federal courts and asserted what she contends is the Corporation's wrongful refusal to consent to the transfer of the stock. Instead, plaintiff chose a state forum for judicial review. She began Action No. 1 in August of 1973 and it was concluded on January 9, 1975, when leave to appeal the Appellate Division's affirmance of Justice Spiegel's order and summary judgment in the Corporation's favor was denied. On February 10, 1975, she commenced this action.

In her state court action, plaintiff alleged that:

> "The rejection by defendant corporation to transfer the aforesaid stock is an arbitrary, capricious and unreasonable determination that will prejudice plaintiff . . . . " (63A) (Emphasis added.)

Also, plaintiff sought a declaration from the Court that the Corporation's refusal to consent to the transfer of the stock was "arbitrary, capricious and unreasonable" (65A).

Having chosen the state forum, plaintiff should have raised all relevant issues available to her in the state action, including the claimed violations of §§ 1983 and

1985(3). State courts are competent to adjudicate questions of federal constitutional rights. NAACP v. Button, 371 U.S. 415, 427-428 (1963); Grubb v. Public Utilities Commission, 281 U.S. 470, 76 (1930); Doherty v. Meisser, 66 Misc. 2d 550, 555 (Sup. Ct. Nassau Co. 1971).

The judgment entered in Action No. 1 specifically provided:

> "3. That defendant corporation has the right or power to refuse to consent to the assignment of the proprietary lease from Stephen S. Girard to Barbara Girard of the fourth floor Apartment at 1125 Fifth Avenue, New York, New York 10028; and
>
> "4. That the defendant corporation's refusal to transfer the stock of defendant corporation from Stephen S. Girard to Barbara Girard and to consent to the assignment of the proprietary lease to the apartment located on the fourth floor of 1125 Fifth Avenue, New York, New York, was authorized by and consistent with the terms of said proprietary lease; . . ." (76A)

Well established principles of the doctrine of res judicata provide that said judgment is a bar to a subsequent action between plaintiff and the Corporation involving the same cause of action. The relief plaintiff seeks in this action is just what the quoted provision of the state court judgment says she cannot have. The rule was put forth succinctly by this Court in Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968):

"The general rule of res judicata is that a valid,

> final judgment, rendered on the merits, constitutes an absolute bar to a subsequent action between the same parties, or those in privity with them, upon the same claim or demand. It operates to bind the parties both as to issues actually litigated and determined in the first suit, and as to those grounds or issues which might have been, but were not, actually raised and decided in that action. The first judgment, when final and on the merits, thus puts an end to the whole cause of action." (Emphasis added.)

Of particular significance to these facts is Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974), cert. denied, 419 U.S. 1038 (1974). There, the plaintiff asserted a § 1983 claim against his landlord alleging that he was evicted from his mobile home park on account of his protests over the conditions at and scarcity of such parks. The plaintiff did not raise his First Amendment claim in the state court action brought successfully by his landlord, but asserted it in the subsequent federal action.

In holding that the plaintiff's § 1983 claim was barred by the prior state court judgment, the court, at page 1263, said:

> "Res judicata precludes even 'perfect defenses . . . of which no proof was offered . . . [A] judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, . . .' Cromwell v. County of Sac, 94 U.S. 351, 352-252, 24 L.Ed. 195 (1877). In Preiser v. Rodriguez, 411 U.S. 475, 497, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court indicated that res judicata would be fully

applicable to § 1983 actions." (Emphasis added)

Also in point is Frazier v. East Baton Rouge Parish School Board, 363 F.2d 861 (5th Cir. 1966). There the plaintiff raised a federal claim of discrimination for the first time in federal court, after his challenge to his dismissal as a public school teacher in the state courts failed. The Frazier court, at page 862, held as follows:

> "[Since] the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action ... Therefore, the decision of the state court of appeal, acting judicially, is a bar to Frazier's claim in the federal district court even though he raises his federal claim of discrimination for the first time in the federal court." (Emphasis in original)

Plaintiff attempts to meet these arguments by contending in Point V of her brief at page 34, that she "did not have to bring her Civil Rights Act claims ... in the state courts." This argument, however, completely misses the mark. The issue is not whether plaintiff could have prosecuted her claims in the district court at all. We agree that she could have had she not first sought to prosecute her cause of action in the state courts. The issue here is whether, having first asserted her cause of action in the state courts and lost, she can now pursue that cause of action in the federal courts.

Nor is Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, _____ U.S. _____, so heavily relied on by plaintiff in Point VI of her brief, applicable here. First, of all, the Court there expressly stated that the doctrine of res judicata was not involved:

> "We think that the problem, strictly speaking, is not a res judicata problem." 502 F.2d at 636.

Indeed, an examination of the facts of the case reveals that the plaintiff in Lombard was in substantial part complaining of the defendants' causing to be circulated "Special Circulars" for the school years 1971-1972 and 1972-1973 directing school principals not to hire him. Because the two state court actions involved in Lombard were commenced in September of 1969 and June of 1971, and decided by the New York Supreme Court in January of 1970 and June of 1972, it appears that the plaintiff could not have litigated all of his federal claims in the state court actions.

Yet another reason why Lombard should be read as a case not involving an exception to the doctrine of res judicata, is 28 U.S.C. § 1738, which provides in pertinent part:

> "[J]udicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Clearly, plaintiff could not relitigate Action No. 1 in the New York State courts even if she asserted claims under §§ 1983 and 1985(3). Weinstein Korn Miller, New York Civil Practice, ¶5011.17 at pp. 50-103 and cases cited therein. She has already had her day in Court and lost. Accordingly, by reason of the above-quoted statutory provision, this same result must obtain in the federal courts.

Even if Lombard is read as a case which provides for an exception to the doctrine of res judicata, that exception is inapposite here. The limits of that supposed exception were defined by the Lombard court, when it distinguished Frazier v. East Baton Rouge School Board, supra, (discussed at page 33, supra):

> "We prefer to treat the statement in Frazier [that the state court judgment is conclusive as to all matters which were litigated or might have been litigated] as obiter so far as a procedural due process claim is concerned, since in Frazier there had been a 'full hearing' in the state court and procedural due process was not involved." 502 F.2d at 636. (Emphasis in original.)

But plaintiff here raises no serious constitutional question involving procedural due process. Defendants, unlike the defendants in Lombard, could not have deprived plaintiff of procedural due process. Defendants in this action have no connection whatever with either the state or federal governments; and the Fourteenth Amendment applies only to "action by

the State." Bond v. Dentzer, supra, 494 F.2d at 305. Thus, plaintiff's claim against the defendants could only arise, if at all, out of the applicable federal statutes, and is, therefore, not within the limited exception to the doctrine of res judicata which plaintiff asserts Lombard created.

Accordingly, plaintiff, under well settled principles of the doctrine of res judicata, is foreclosed from raising the claims asserted in the district court.

CONCLUSION

For the reasons stated, the order made by the district court should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA GIGARD, Plaintiff-Appellant, *against* 94th STREET AND FIFTH AVE. CORP., etal., Defendants-Appellants.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 24th *day of* September *1975 at* 1) 1180 Ave of the Americas, N.Y., N.Y.
2) 777 Third Ave, N.Y., N.Y.

deponent served the annexed Appellees Brief 1) Ballon Stoll & Itzler *upon*
2) O. John Rogge

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James A. Steele
Print name beneath signature

JAMES A. STEELE

Sworn to before me, this 24th
day of September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977